on him. Whenever the decision has been put on other grounds, such as that the defendant never made or delivered the instrument, that he never voluntarily parted with it, that his mind did not go with the deed, that the paper amounted to a forgery, &c., it will be found that these facts either tended to show the absence of negligence, or were essential because issue had not been made on such negligence. Thus in *Burson* v. *Huntington*, *Walker* v. *Ebert*, *Cline* v. *Guthrie*, *Brown* v. *Reed*, *supra*, the offer of the defendant was in effect to show that he had been reasonably diligent. Forgery and theft are probably extreme cases; yet it has been repeatedly laid down that a negotiable instrument stolen and put in circulation can be recovered on; and in *Ingham* v. *Primrose*, *supra*, the court intimate that a forgery which the defendant by his negligence had made possible would not be a ground of defence against a bonâ fide holder. In *Chapman* v. *Rose*, *supra*, the question was fully and carefully decided in a manner which appears to satisfy common sense and reasonably protect the holders of negotiable securities. R. S. HUNTER.

Supreme Court of the United States.

WASHINGTON COCKLE ET AL. *v.* JAMES W. FLACK ET AL.

Where a commission merchant in Baltimore advanced to a pork packer in Peoria $100,000, for which he was to receive interest at the rate of 10 per cent. per annum, and a fixed commission for the sale of the product, to be paid whether it was sold by the commission merchant or not, it was properly left to the jury to decide on all the facts whether or not the commissions were a cover for usury, or were an honest contract for commission business in connection with the use of money.

The express agreement of 10 per cent. is not usurious, because lawful in Illinois though not so in Maryland: *Andrews* v. *Pond*, 13 Pet. 65, re-affirmed.

IN error to the Circuit Court of the United States for the Northern District of Illinois.

The opinion of the court was delivered by

MILLER, J.—Plaintiffs in error were engaged in the business of packing pork in Peoria, Illinois, and the defendants were commission merchants in Baltimore, in the fall of 1872, when the contract was made which is the foundation of this suit. There had been transactions between the parties the previous year in the line of their business, and with reference to the packing business of the approaching season. This agreement was made by letter. The substance of it is that defendants should advance to plaintiffs as it was needed, the sum of $100,000, which they were to invest in the hog product, at the rate of 80 per cent. of the money so advanced, and 20 per cent. of the money put in to the purchase by plaintiffs. Defendants were to have interest on the money

advanced at the rate of 10 per cent. per annum. The product was to be shipped to them for sale, and they were to have $2\frac{1}{2}$ per cent. commission on the amount if sold within sixty days, and 1 per cent. commission for every thirty days it was carried thereafter. The contract gave to plaintiffs the right to sell for themselves without sending to defendants, but the latter were to have their commissions all the same.

When the product had all been sold out and an account rendered, a balance was found to be due defendants in error, for which they brought this suit, and recovered a judgment of $7054.48.

It appears by the bill of exceptions that this balance was mainly if not wholly made up of the commissions charged on sales *not* made by defendants of products which never came to their possession, and the recovery was resisted on the sole ground that these commissions were a device to cover usurious interest.

The charge of the court to the jury on this point was to the effect that the transaction was not necessarily usurious; that defendants being engaged in the commission business, which required the use of money, might loan their money at lawful rates of interest to such parties, and on such terms that it would bring to them also the business which would grow out of the investment of it, that if the contract was made only with the honest purpose of securing in addition to interest, the profits incidental to handling the product as commission merchants, it was not usurious; that on the other hand such a contract might be used as a mere evasive device to cover usurious interest, and the charge left it to the jury to say from all the circumstances whether this were so.

There can be no question that on the general doctrine as to the line which marks the division between an honest transaction and a usurious cover, the charge of the court was correct, and that it is in this class of cases the province of the jury in jury trials, and of the chancellor in suits in equity to determine on a full consideration of all the facts whether it be the one or the other.

But counsel for plaintiffs in error argue that as to these commissions which defendants never earned by sale of the property or by handling it, and as to which they were put to no cost or inconvenience, there can be no other consideration but the use of the money, and they are necessarily usurious.

It must be confessed that the argument has much force. But we are of opinion that it is not so conclusive that the court ought to have held as matter of law that it was usury.

It is to be considered that defendants were engaged in a business which was legitimate, and in which both custom and sound principle authorized the joint use of their money and their personal service, increased in value by their character for integrity and experience. To both these sources they looked for their profits, and they were necessarily united.

It was a necessity of their trade, and it was lawful for them while loaning their money at a specified rate of interest to stipulate with the parties to whom it was loaned for the incidental advantages of acting as commission merchants for the sale of the property in which the money was to be invested by the borrower. They had the right also to require as a condition of the loan that it should be invested in such property as would require their services in selling and handling it. All this is admitted.

We see no reason why the parties could not go a step further, and stipulate that if for any reason operating in the interest of the borrower, he should prefer to become his own broker or commission merchant, or to sell at home, he should pay the commission which the other had a right to contract for and receive. Like the port pilot, and other instances, they were ready and willing to perform. They had a place of business, clerks, and their own time and skill ready to devote to the plaintiffs' business. In that business they had a large pecuniary interest. They had loaned their money without requiring any other security than the obligation of the other party, except that which might arise from the property coming to their hands. To make this property a sufficient security the contract required of the plaintiffs that they should invest in the same property $20 of their own money to every $80 borrowed of defendants. The relinquishment of this right to control the sale of the property was a good consideration for the commissions which they would have made if they had sold it.

While it was possible to make such a transaction a mere cover for usury, it was at the same time possible that the contract was a fair one, in aid of defendants' business, a business in which they were actually and largely engaged, and in which lending money was the mere incident and not the main pursuit.

It was, therefore, properly left to the jury to say whether, under all the circumstances it was or was not a usurious transaction, under instruction to which we can see no objection.

We do not think the express reservation of 10 per cent. interest

makes the contract usurious, because the law of Maryland forbids more than six. The contract was quite as much an Illinois contract where 10 per cent. is lawful as a Maryland contract, and the former is the law of the forum. The ruling of the court below was in accord with what this court had held in *Andrews* v. *Pond*, 13 Pet. 65.

The judgment of the Circuit Court is affirmed.

Supreme Judicial Court of Maine.

MARY S. STEVENS *v.* E. & N. A. RAILWAY.

Although the burden of proof falls upon a plaintiff to establish the negligence of a railroad company sued for an injury caused by their cars running off the track; still, where the plaintiff is guilty of no negligence, and the cause of the accident is not disclosed by the attending circumstances, the burden of explanation falls upon the company to show that there was no fault upon their part; and a jury would be authorized to presume them guilty of negligence if they fail to do so.

CASE brought to recover damages for personal injuries received on the defendants' railway, August 28th 1873.

It appeared in evidence that the plaintiff was a passenger on the car of the defendant company, getting on at Bangor; that the car, being about three-fourths full, proceeded about twenty-five rods from the depot at a rate of speed from five to ten miles an hour, and then went off the track, producing a slight shock. It did not appear that the car was damaged, or that any of the passengers, except this plaintiff, received any injury. The passengers left the car, the plaintiff, among others; and she walked to her house some four-fifths of a mile.

She testified that she was fifty-four years of age and in good health when she entered the car; that the train commenced slatting soon after the cars started, slat her from right to left, then stopped, jerked back, and then pitched forward; that her back was thrown against the back of her seat; that she was also pitched on to the back of the seat in front; that she at first fainted, and then recovered somewhat and was assisted out of the car; that by resting frequently on the way and receiving some support, she succeeded in reaching her home, took her lounge, had severe pain in the back, hip and head; sent for the doctor, took and kept her bed entirely for five days; that she got up very poorly; found she